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United States Circuit Court of Appeals

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SECOND CIRCUIT.

ATLAS STEAMSHIP COMPANY,
Libellant and Appellant,

vs.

The Steamship LA BOURGOGNE, her engines, etc., COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Appellee.

No. 21.

CHARLES B. WHEELER,
Libellant and Appellant,

vs.

The Steamship LA BOURGOGNE, her engines, etc., COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Appellee.

No. 22.

WESTERN ASSURANCE COMPANY OF TORONTO and others,
Libellants and Appellants,

vs.

The Steamship LA BOURGOGNE, her engines, etc., COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Appellee.

No. 23.

Brief in Behalf of La Bourgogne.

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Brief in Behalf of La Bourgogne.

Statement.

On the afternoon of Saturday, February 29th, 1896, a collision occurred between the steamship *La Bour-*

gogne and the steamship *Ailsa* in the Lower Bay of New York, below the Narrows.

The *Ailsa* left her pier a little after 12 o'clock on a voyage from New York to the West Indies. The weather was rainy when she started. As she went down towards the Narrows a fog was encountered, so that her master and pilot determined to anchor (Libel, fol. 16). They kept on till after they had passed Fort Lafayette about half a mile, and then came to anchor at about a quarter past one. The tide was setting out, and as the *Ailsa* lay at anchor she headed against it about North by West.

The *Bourgogne* left her pier at the foot of Morton street, at a little after one o'clock, on a voyage from New York to Havre. The weather continuing the same, the *Bourgogne* also found, when she was a little below Quarantine, that the fog was so thick as to make it dangerous to proceed to sea. Her captain and pilot, therefore, on consultation, determined to anchor. They were then below Quarantine. The Treasury regulations forbade anchoring on the west side of the channel, and, moreover, the fog was less dense on the eastern side of the channel. Accordingly, the captain and pilot determined to go to Gravesend Bay, as the nearest anchorage ground for a vessel so large as the *Bourgogne*. The steamer accordingly kept on at as slow a rate of speed as was consistent with control of the ship, her engines being by turns stopped and started ahead again slowly. She was heading S. 11° E. or S. by E. true (fols. 1218, 1451). After passing Fort Lafayette her engines were stopped entirely, the vessel going under her headway and the force of the tide for a short time. The order was given to change the helm so as to put the head of the ship to port, in order to run out of the channel to the anchorage ground in Gravesend Bay. But, before any material change had been made in the heading of the *Bourgogne*, her lookout sighted the *Ailsa* about ahead, but a little on the port bow.

The *Ailsa* was immediately reported, and the engines of the *Bourgogne* were at once reversed at full speed and her helm starboarded to swing her head to the west-

ward, but before the headway of the *Bourgogne* could be stopped, she came in collision with the *Ailsa*, nearly head on but on the port side, doing serious injury to the *Ailsa*. Under her reversed engine the *Bourgogne* backed away from the *Ailsa* to what the master of the *Bourgogne* considered a safe distance to avoid being carried upon her again by the tide, and then he went ahead (the reversal of his engine having swung his head to starboard sufficiently to clear the *Ailsa*), and passed astern of her, reversing and going ahead so as to keep his vessel in about the same place (fol. 1226), until, when he had reached what he deemed a safe distance, he came to anchor.

After the collision the *Ailsa's* anchor was got up and her engines started ahead to run her ashore, which was done. While she was going towards the shore the steamer *Advance*, which was also going to the anchorage ground, made her appearance and crossed the *Ailsa's* bows in such a position that the master and pilot saw the *Ailsa* bring up in shallower water and sink. The *Advance* anchored some distance below where the *Ailsa* sank.

No signal of the *Ailsa* calling for assistance had been heard on board of the *Bourgogne*. As soon as she anchored her boats were prepared ready to render assistance in case it should be found that they were needed, but nothing was heard from the *Ailsa*.

The fog having cleared up about an hour and a half afterwards, the masts of the *Ailsa* were seen above the water where she had sunk, northward and eastward of where the *Bourgogne* was at anchor. The German Lloyd's steamer *Werra* was lying at anchor about 300 or 350 yards to the eastward and abreast of the *Bourgogne;* the *Advance* was at anchor to the northward and eastward of the *Werra*; and to the southward and eastward of the *Werra* were six or seven other vessels at anchor, among them the Cunarder, *Campania*. No other vessel was seen at anchor north of the *Bourgogne*.

From the time when the *Bourgogne* ran into the fog her whistles were blown at intervals of 30 or 40 seconds.

None of her whistles were heard on board of the *Ailsa*.

It is claimed by the *Ailsa* that her bell was being rung continually after she anchored. But her bell was not heard on the *Bourgogne* until after the *Ailsa* was seen. An officer of the *Ailsa* was on her bridge before the collision. Whether it was the first or the second officer is in dispute; and whether her bell was rung as the *Bourgogne* was approaching is also in dispute. She had no man on watch on her forecastle deck. Her pilot says he was on deck under the bridge. Her master was in his room.

The regulations of the Secretary of the Treasury of the United States in relation to the anchoring of vessels in New York Harbor, which have the force of law, issued on the 5th of July, 1889, were put in evidence (fol. 1696). They begin by providing as follows: "The following described anchorage grounds for vessels in the Bay and Harbor of New York and in the Hudson and East Rivers are hereby defined and established, and the following rules and regulations in relation thereto are hereby adopted and published for the government of the owners, masters or persons in charge of any vessel in the Port of New York," etc., etc.

"*Eastern Anchorages. Upper and Lower Bays.*"

"Vessels may anchor within the following limits: 15. * * * To the eastward of a range passing through Buoy 18 off Owl's Head, the western edge of Long Island in the Narrows and the eastern side of Fort Lafayette as far south as the East Channel, between Buoys 4 and 2."

"*Staten Island Anchorage.*"

17. "Vessels may anchor, * * * * * to the westward of a line from Robbin's Reef Lighthouse through a point one thousand yards east of the Quarantine Wharf at Clifton, to the buoy on Craven Shoal * * *.

"The part of anchorage 17 lying between its northern

boundary and a line running parallel thereto and 800 yards south of said boundary is reserved for ships of war of all nations and vessels of the United States Government.

"NOTE: No other vessels than those which are detained at Upper Quarantine shall anchor on this anchorage between Fort Tompkins Light and Quarantine Wharf at Clifton, Staten Island."

Cross libels were filed by the owners of the *Ailsa* and the owners of the *Bourgogne*, and libels against both steamers were filed by the insurers of the cargo on board the *Ailsa* and by passengers on her.

The District Court dismissed the libels against the *Bourgogne*, and the libellants against her appeal.

The facts concerning the collision in this case and the law applicable to them show, as we contend on behalf of the *Bourgogne*, that she was wholly without fault, whilst the *Ailsa* was guilty of all the faults charged against her in the *Bourgogne's* libel, and that the decree of the District Court should be affirmed.

The brief of counsel for the *Ailsa* charges four faults upon the *Bourgogne*. (Brief, p. 5.) Only one of them was thought of in the beginning enough to be mentioned in the libel of the owners of the *Ailsa*.

But before taking them up for discussion in order, we present one or two points on the law of the case.

FIRST POINT.

The burden of proof is on the Ailsa, not on the Bourgogne.

It is claimed by counsel for the *Ailsa* that the law is that "Where a collision takes place between a vessel in motion and a vessel at anchor, the burden of proof is on the vessel in motion to show that the collision occurred without fault on her part." We maintain, on the other hand, that the rule of law is that where a collision takes place between a vessel in motion and a

vessel at anchor, the duty devolves upon the vessel at anchor *first* to show that she was anchored in a proper place, and observed proper precautions, and *thereafter* the burden is on the vessel in motion. We maintain that such is the effect of the cases cited on the appellant's brief (pp. 9–10), as well as many other cases.

Thus, in the case of *The Lady Franklin*, the Court had found that the anchored vessel was in a proper place, and the collision was in daylight and in clear weather. On those facts the language quoted in the *Ailsa's* counsel's brief from Judge Lowell's opinion states the rule; but it is in no way applicable to the present case.

In the cases of *The Rockaway*, *The Blue Bell* and *The Otter*, the vessel at anchor was also anchored in a proper place. All these cases, therefore, are subject to the same criticism.

In the case of *The Louisiana*, the vessel that was injured was aground on a bar outside of the channel.

In the case of *The Granite State* the vessel injured was lying at a wharf.

In the case of *The Annot Lyle*, the language of the decision of the Court is that where a "*ship is properly anchored and has a light set*, then the burden of proof is on the vessel in motion," which is the rule as we maintain it to be.

So in The *Indus*, the burden is put upon the vessel in motion to avoid a vessel at anchor "if the latter can be seen." And the *Indus* was anchored in a proper place.

The case of The *Bothnia* was only a question of pleading.

The case of The *Baltic* was the case of a collision in broad daylight on a clear day. And in that case a vessel, which was at a pier but where she had no right to lie, was held in fault for so lying.

In the case of The *Meanatchy* and in the case of The *Batavier* the vessels at anchor were held to be anchored in a proper place.

No case is cited on behalf of the appellants which lays down the rule as the appellant's brief claims it to be.

Marsden on Collisions (p. 31) says "that in case of a collision between a ship under way and another at anchor, *provided there was no negligence of the latter in respect to her lights or place of anchoring*, the burden is upon the other ship to show she was not in fault."

A striking case to show that the rule is as we claim, and that the burden of proof is on the *Ailsa* while no presumption is raised against the *Bourgogne*, is the case of The *Chauncey M. Depew*, 59 Fed. R., 791, 794. In that case a derrick was anchored in the East River, not on anchorage ground, for the purpose of raising a sunken vessel, and though the Court found that the anchoring of the derrick was not, under the circumstances, unlawful, it nevertheless held that other vessels were *only required to use ordinary care and diligence* to avoid collision, and that the fact of collision raised no presumption of negligence. The learned Judge said: "As regards the claims made against the tugs, it is to be observed that the derrick, on the other hand, not lying upon any authorized anchorage ground, *was not entitled to all the immunities of vessels so anchored and lying out of the usual channel way.* Her position, on the contrary, was in the channel way, and though lawful (a permit having been given by the Secretary of the Treasury) was in the midst of busy traffic, where her presence at times added greatly to the difficulties of navigation by other vessels. Those vessels were doubtless, required to use skill and diligence to avoid the derrick and each other; but they were not otherwise answerable for the results. And in determining whether skill and diligence have been exercised, *the mere fact of collision* with the derrick in a place like this is *no prima facie evidence of negligence*, as in the ordinary case of a collision with a wharf, or with a vessel moored at a wharf, or upon ground out of the channel way and set apart for anchorage."

SECOND POINT.

If the Ailsa was at anchor in an improper and prohibited place she must take the consequences and suffer the whole loss in this case.

In The *Clarita* and the *Clara*, 23 Wall., 1–14, the Supreme Court of the United States, through Mr. Justice CLIFFORD, said :

" Undoubtedly if a vessel anchors in an improper place she must take the consequences of her own improper act ;" and the Court refers to the case of Strout *v.* Foster, 1 How., 89, in support of this view.

In that case it appears that the ship *Harriet* anchored in one of the passes of the Mississippi River, and the *Louisville*, another vessel, ran afoul of her whilst coming in.

Mr. Justice MCKINLEY, in deciding the case at Circuit, said :

" The misconduct on the part of the master of the *Harriet*, in anchoring his ship immediately in the thoroughfare, is fully made out by the proof ; while, on the contrary, there is no fault proved, going to show mismanagement, want of skill or negligence on the part of the master of the *Louisville*. It is true that the opinions of some nautical men, found in the evidence, show that it was possible for the *Louisville* to have avoided the collision, *had everything been done that it was possible to do. But the law imposes no such diligence on the party in this case; so far as the Harrie was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass ;* the master of the *Harriet* having obstructed it with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellants."

" It was insisted by the counsel of the appellees that the *Harriet* being at anchor and the other ship

under sail, that the latter was, therefore, liable. It is true, that if a ship be at anchor, with no sail set, and in a proper place for anchoring, and another ship under sail occasions damage to her, the latter is liable. But the place where the *Harriet* anchored was an improper place, and, therefore, the appellees must abide the consequences of the misconduct of the master."

Strout *v.* Foster, 1 How., 90, 92.

The doctrine of the case of Strout *v.* Foster has been repeatedly affirmed in other American and English cases.

See,

The *Scioto*, 2 Ware, 360.
The *Marcia Tribou*, 2 Sprague, 17.
The *Bedford*, 5 Blatch., 201.
The *Helen*, 1 Fed. Rep., 923.
The *Henry Warner*, 29 Fed. Rep., 601.
Lambert *v.* Staten Island R. R. Co., 70 N. Y., 108.

Counsel for the *Ailsa* has made no reference to any of these cases except to the case of Strout *v.* Foster, which he says (Brief, p. 10) is "not authority for any purpose," because the Supreme Court was equally divided. Counsel should have seen that the point on which the Court was divided was not the one for which we quoted the case as authority.—As to that point it was cited as authority by the Supreme Court itself in the case of The *Clarita & Clara*, and that should have been, we think, sufficient for the counsel of the *Ailsa*.

The English case of The *Kjobenhavn* (2 Asp. N. S., 213) is particularly in point.

In that case The *Kjobenhavn*, which was at anchor *in an improper place* was run into by the *Mermaid* and was libelled in behalf of the *Mermaid*, which alleged as the fault that the *Kjobenhavn* was anchored in an improper place. The Court found that it was an improper place, and proceeded to examine the excuse which the *Kjobenhavn* gave for her being

at anchor there, viz., that she had come into collision with *a brig at anchor in an improper place.* And the Court considered that her responsibility for the second collision depended upon whether she was in fault in the first; that is, whether the place of anchorage was forced upon her without her fault. As to the first collision the Court said:

"It appears clear upon the evidence that the brig was anchored in an improper place, in a place in which she should not have anchored without excuse. The fog seems to have been her excuse for dropping her anchor there, but still she was in a place in which a steamer coming up the river would not reasonably expect to find a vessel at anchor. Taking into consideration these circumstances, the moderate speed at which the vessel was proceeding (she was going at half speed), that she was proceeding under a port helm, and that, owing to the fog, she could not see the brig earlier than she did, their lordships are of the opinion that the *Kjobenhavn* cannot be said to have been in fault in respect of *that collision.*"

That is to say, the Court excused the otherwise improper anchorage of the *Kjobenhavn*, because it was forced upon her by a very recent collision with a brig in which she was *not at fault, because the brig was anchored in an improper place.*

That first and excused collision is exactly the case of the *Bourgogne.*

THIRD POINT.

The Bourgogne was not in fault for proceeding through the Narrows to an anchorage.

The principal charge which is made against *La Bourgogne*, in fact the only one which was made in the libel of the owners of the *Ailsa*, is that she was in fault in proceeding through the Narrows at all, in the condition of the weather then existing. Counsel for the *Ailsa* calls it the "radical fault," (Brief, p. 10).

(*a.*) It is shown that four steamers, the *Ailsa*, the *Werra*, the *Bourgogne* and the *Advance* went down the Bay about the same time. Shortly after them came the *Seneca* and one of the Hamburg steamers.

(*b.*) The *Galileo* went partly down the Bay, but when cannot be determined. Her pilot testified that he went down about half past 12 o'clock (fols. 401–2), anchoring off Stapleton about 2; and that he saw the *Ailsa* and the *Bourgogne* as they went down, while he was at anchor off Stapleton, and about 3 P. M. (fol. 412) which was nearly two hours after the collision. But thereupon the *Ailsa* recalled her pilot, Shooks, to prove that, when the *Ailsa* went down about half past twelve, he saw the *Galileo* at anchor just below the Statue of Liberty (fol. 416) and not off Stapleton. And it is plain that, inasmuch as the pilot of the *Ailsa* testifies, that when she went down it was so thick off Staten Island that he only saw the royals of some vessels at anchor there (fol. 230), the pilot of the *Galileo*, if he had been then anchored there, could not have seen more than the royals of any vessels going by, and could not have seen the *Ailsa* and the *Bourgogne* when they went down. But he swears he did see them when they went by. So that the *Galileo* must have been then at anchor just below Liberty Island. How long after that she went down it is not possible to tell.

(*c.*) Now, we have the statements of witnesses on the *Ailsa*, the *Bourgogne* and the *Advance* as to the weather which each of them encountered. And as the *Werra* came down between the *Ailsa* and the *Bourgogne* her weather was the same. **All** these vessels met the same kind of weather.

The allegation of the *Ailsa's* libel is as follows:

"Upon approaching the Narrows the *Ailsa* ran into a fog; after consultation * * it was deemed imprudent to continue any further, owing to the increasing density of the fog" (fols. 15, 16).

The evidence of the navigators of these vessels is as follows:

SHOOK, pilot of the *Ailsa* (fol. 227):

Weather when we started was thick and rainy. Rainy and misty.

(fol. 228):

Ran into fog just below Bay Ridge. Fog was thickest on Staten Island shore. (fol. 230) Couldn't see anything above it but a few ships lying there. I saw the royal yards. We slowed down when we got into the fog. (fol. 231) Stopped engines after we passed Fort Lafayette, anchored below.

CAPT. MORRIS, of the *Ailsa* (fol. 420):

We first perceived the fog when we were down to the Narrows.

(fol. 421):

Fog thicker on the starboard side on Staten Island shore.

(fol. 423):

Ran into very thick fog almost immediately after passing Fort Lafayette—in two or three minutes.

(fols. 471–2):

Slowed when we got into the fog before we struck the Narrows—about half a mile above. I didn't see the Quarantine Station; wasn't looking at it.

COTE, mate of the *Ailsa* (fol. 544):

We ran into fog just at the beginning of the Narrows:

(fols. 545–6):

She was going slow as soon as the fog began to the northward of the entrance to the Narrows; about the north end of Staten Island, the ferry landing at St. George.

CAPT. BEERS, of the *Advance* (fols. 1156–7):

Encountered fog about off Robbins Reef. Between Robbins Reef and Staten Island went into a regular thick fog bank. Slowed down and then stopped. Ran down till we got below Fort Lafayette, and anchored.

WATSON, pilot of the *Advance* (fol. 1646):

As we went down it was thick and raining. * * * We made the Bell Buoy on the Mud Flats. The Long Island Shore was all in sight. On the Staten Island shore we couldn't see anything.

(fol. 1677):

Could not see the ferry at St. George. Saw Robbins Reef light.

POIROT, Captain of the *Bourgogne* (fol. 1215):

When we left the wharf the weather was quite clear. We saw sufficiently well to navigate, and up to Robbins Reef the weather remained sufficiently clear. We had good sight.

Q. How was the weather after passing Robbins Reef?

A. The weather got foggy quite fast, more foggy than it had been. When we got down about to Quarantine it became very thick, especially on the Staten Island side.

Q. Was the fog any lighter on the Long Island side?

A. It was.

A. H. MURPHY, pilot of the *Bourgogne* (fol. 1442):

The weather, as we started, was rainy and hazy.

(fol. 1443):

Q. How was the weather when you got down by Robbins Reef?

A. On the west shore it was all foggy, on the east shore it was clear.

(fols. 1445–8):

Q. As you went down below Robbins Reef, what was the appearance of the view down the Narrows?

A. You could see from the Buoy on the Mud Flats, you could see the red houses on the dock just above Fort Lafayette on the Long Island side; on the other side it was all shut in, that is from mid channel to the westward.

Q. Could you see vessels at Quarantine?

A. No, sir

Q. As you went down towards Fort Lafayette was there any change in the weather?

A. As we got near to it it commenced to get thicker. When we got down abreast of this dock just above

Fort Lafayette, it commenced to shut down on us there, and we reduced speed and kept our whistle blowing.

Q. Was that reduction of your speed when you were above Quarantine or below?

A. Above; just above it

Q. How did the weather continue from that time?

A. As we was going down it got a little thicker with us, and finally when we got down below this dock above the Fort, it did shut down thicker.

Q. Where did you slow first?

A. Above Quarantine.

Q. How far below Quarantine had you got when it shut down thick?

A. About half way between Quarantine and the Fort, I should judge; Fort Tompkins.

(*d.*) This evidence of these witnesses shows that each of the vessels, as she went down the Bay, met a gradually thickening fog, thicker on the Staten Island shore, and thinner on the Long Island shore, and becoming very thick about Fort Lafayette.

And the question being a question of prudent navigation, the fact that these four vessels pursued the same navigation, followed afterwards in it by the *Seneca* and the Hamburg steamer, is sufficient to show that it was no fault in the *Bourgogne* that she sought anchorage ground in Gravesend Bay, and that for this purpose she went on after she met the fog, just as all the other vessels, including the *Ailsa*, had done. The Court will not undertake to say that the course of navigation which the pilots of six vessels pursued on that day was a faulty one.

(*e.*) If we consider the case, leaving entirely out of view the Treasury Regulations which forbade the *Bourgogne* to anchor in the channel, the question is one of prudent management. Was it prudent or was it negligent in the pilot of the *Bourgogne* to take the same course of navigation which five other pilots took under the same circumstances? The very definition of negligence shows that it was not negligent for him to do so. For "negligence is the failure to do what a reasonable and prudent person would ordinarily have

done under the circumstances of the situation." (Railroad Co. *v.* Jones, 95 U. S., 441.)

Here were five persons all ordinarily reasonable and prudent persons, all of whom pursued the same course. The pilot of the *Bourgogne* can not be singled out as being negligent.

The counsel for the *Ailsa* refers to the cases which hold a vessel negligent for not going at a moderate speed in a fog. But that is the case of a violation of an express statutory requirement.

The statute commands a vessel to go "at a moderate speed in a fog." There is no statute which commands a vessel not to proceed at all in a fog, but to anchor at once.

The command to "go at a moderate speed" is in fact inconsistent with a command not to go at all. Whether to anchor or not on that day was a question not of statutory regulation but of prudent management; and as to that the actions of the five pilots, including the *Ailsa's* pilot, speak louder than the words of the *Ailsa's* counsel.

The effect of the Treasury Regulations will be considered further on.

(*f.*) Counsel for the *Ailsa* suggests (Brief, p. 10) that there was a difference of opinion between Capt. Poirot and the pilot of the *Bourgogne* as to anchoring, as if Capt. Poirot wished to anchor at once, instead of keeping on through the Narrows.

But this is a strained construction of Capt. Poirot's evidence, which was as follows:

(fol. 1219):

"As soon as I saw that the fog got very thick, I told the pilot I wanted to anchor. The pilot called my attention to the fact that we were too much engaged in the Narrows, and that we were right in the middle of the Channel, and that we must go and anchor to the south of Fort Lafayette in Gravesend Bay; that using the bell on Fort Lafayette as a guide, we could go and anchor there. And that is what we did."

Murphy's evidence is as follows (fol. 1448):

"The captain spoke to me about anchoring at Quarantine. I told him it was not prudent to go in there. It would be better for us to go down to Gravesend Bay and anchor in a safe place, and he said, 'All right.'"

Here is no proof of any difference of judgment between Captain Poirot and the pilot. But, if there were, the pilot's judgment was correct. Anchoring on the Staten Island side between Fort Tompkins Light and Quarantine is forbidden except for vessels "detained at upper Quarantine." And, as between the prudence of turning the *Bourgogne* round in the fog and going back up to abreast of Stapleton, and the prudence of going on to Gravesend Bay, there can be no dispute that the course pursued wasthe best.

See Murphy, fols. 1505-1508; 1521-2.

The argument of the Opinion of the District Judge on this point is unanswerable (fols. 1859 to 1864).

(*g.*) The *Ailsa's* counsel is under a misapprehension as to the position of the *Bourgogne* when the question of anchoring arose between the Captain and the pilot. His brief states on page 3, that it was "as they *approached* Quarantine," and on page 10 he states that it was "*above* Quarantine, about midchannel, 3,750 feet from Fort Lafayette." Whereas it was, as both the Captain and pilot of the *Bourgogne* testify, *below* Quarantine. The counsel's brief at page 10 says that "Judge Brown's remark (p. 319, fol. 1273) that the spot marked was about a quarter of a mile below Quarantine, was certainly an inadvertence."

Plainly enough there is an inadvertence, but it is on the part of the counsel for the *Ailsa*, not on the part of Judge Brown. Counsel for the *Ailsa* has inadvertently treated the line of the two sheets of the chart, pasted together (on which he himself said (fol. 1272) that the witness made the mark), as being at right angles with the channel, which it is not. Judge Brown drew the line, as it should be drawn, at right angles to the chan-

nel from the wharf at Quarantine, and the point marked by Capt. Poirot on the chart is exactly as Judge Brown said, "about a quarter of a mile below Quarantine."

(*h.*) The situation, then, of the captain and pilot of the *Bourgogne* was this: They had passed Quarantine a quarter of a mile or so, when they found that the fog was so thick as to make it wise to anchor. There were four courses possible: (1st) to anchor in mid-channel, where they were; (2d) to anchor below Quarantine on the Staten Island side; (3d) to turn around and go up stream and anchor somewhere in the upper bay; and (4th) to proceed to the Gravesend Bay Anchorage.

But the first course, viz, anchoring in the channel, was forbidden by the Treasury Regulations. And so was the second. The Treasury circular of July 5, 1889, issuing the Regulations, begins by saying: "The regulations relating to the anchorage of vessels in the Port of New York, made this day, will be strictly observed, and all officers of revenue vessels at the Port of New York are hereby empowered and directed in cases of necessity or when a proper notice has been disregarded, to use the force at their command to remove *from the channel ways* any vessel found *violating* the Rules."

The *Ailsa's* counsel seems to claim to have special knowledge of the purpose of the Regulations, for he says: that they are meant to "point out where vessels may lie for weeks." Having no such special knowledge ourselves, it seems to us that the Secretary of the Treasury must be presumed to have meant just what his words said: that providing where vessels "may anchor" means that they may not anchor elsewhere; and that the provision that vessels "shall not anchor" in a certain part of the river is not repealed by the existence of a fog, or the absence of signals.

Counsel for the *Ailsa* can hardly be serious in suggesting that the words of the Regulations "detained at upper Quarantine" include the *Bourgogne*, because

she ought to have been detained by fog. The vessels excepted from that regulation are not outward-bound but inward-bound vessels which are "detained" by the Quarantine authorities.

"Detained" is a very familiar word in the Quarantine Laws, used in reference to the action of the Health Authorities.

"Shall not be detained."

N. Y. Stat. of 1863, Chap. 358, § 9.

"Shall be detained."

Id., § 15.

As to the third measure to be taken the evidence of the pilot (fols. 1505–6) and captain (fol. 1277), as to its unwisdom must commend itself to anyone. It is left entirely uncontradicted. And in fact it is not claimed by the appellant's counsel that she should have taken that course.

(*i.*) The ground is boldly taken by the appellant's counsel that the *Bourgogne* was in fault in not having anchored "before she reached the fog." (*Ailsa's* brief, p. 10.)

But there is absolutely no rule of law or requirement of prudent navigation calling for any such thing. The cases all hold (including the cases cited by the *Ailsa's* counsel) that it is only when *in* a fog that a vessel may, if necessary, be required to anchor. The regulations require every vessel "*in* a fog" to go at a moderate speed, and in the case of *The Saale* (63 F. R., 478) it was held that a vessel must reduce her speed as soon as she enters a fog bank. We challenged counsel in the court below to cite a single case holding that a vessel must anchor *before entering* a fog. None was cited there and none is cited here. In the case of *The Blue Bell*, it was said that "in a dense fog it is the duty of a steam vessel to anchor *as soon as circumstances will permit.*" This is exactly what the *Bourgogne* did. She did not encounter the dense fog until after she reached a point in the river below Quarantine;

and then the only proper anchorage which "circumstances permitted," was just the place which she selected and attempted to reach.

The regulation requiring the *Bourgogne* to anchor east of the line marked out by the Treasury Regulations was a most important "circumstance;" and that did not "permit" the *Bourgogne* to anchor in the channel or permit the *Ailsa* to anchor where she did. We need not discuss the question whether a vessel would be justified, notwithstanding the regulation, in anchoring elsewhere than on anchorage ground "in an emergency;" for it is manifest that there was no emergency.

There would have been no difficulty with the soundings and the bell on Fort Lafayette, in the *Ailsa's* putting herself on anchorage ground. The *Bourgogne's* navigators recognized that there was no difficulty in doing so. "The pilot said that using the bell on Fort Lafayette as a guide we could go and anchor in Gravesend Bay" (Poirot, fol. 1219). When she had the bell on Fort Lafayette West of North from her she would know that she was on anchorage ground; and the soundings would prevent her from any danger of running aground in going thither.

None of the other steamers that went down that day considered that there was any "emergency" which called upon them to anchor in the channel. And even the *Ailsa* herself did not consider that the fog was "emergency" enough to call upon her to anchor *at once*, for she ran into the fog "on *approaching* the Narrows," and did not anchor until she was half a mile or more below Fort Lafayette.

(*j.*) The *Ailsa's* counsel says (Brief, p. 13): "Counsel for the *Bourgogne* was challenged in the Court below to give a good reason for not anchoring off Bay Ridge. He gave none there. It is believed he can give none here."

We gave the following reason in the Court below, and we repeat it here. As to its *goodness*, the Court must judge:

"The reason for the *Bourgogne's* not anchoring off Bay Ridge is manifest. The atmosphere at that time was such that the pilot and master of the *Bourgogne* could see nearly two miles. There was no reason whatever, therefore, for anchoring. They could not tell then but what, when they arrived at Fort Lafayette, the atmosphere would still be such that they could see two miles further. And no steamer could be required to anchor at a time when she could see two miles ahead."

No case has been cited and no case can be found holding that a vessel whose navigators can see two miles is required to anchor because the fog is thicker around her than it has been, or because there is a prospect that the fog may become thicker as she goes on. It is not until the fog becomes so thick as to make navigation dangerous that the question arises on a vessel whether it is her duty to anchor. That question did not arise in this case until the *Bourgogne* was below Quarantine. And her navigators at once determined to anchor and at once determined to go to the nearest and best place for that purpose.

We repeat that, when the ship was off the buoy on the Mud Flats, which is below Robbins Reef, while the weather was thick on the Staten Island side, the pilot could see on the Long Island side down to the red house on the dock just above Fort Lafayette (Murphy, fol. 1445) which is more than two miles below.

He could not tell then but that when the *Bourgogne* should reach Fort Lafayette he would still be able to see two miles ahead. He was, therefore, perfectly justified in keeping on till the fog became so thick as to interfere with the further progress of the vessel. When that time arrived she was below Quarantine, and the pilot and captain then agreed upon anchoring. And being there, the going to anchorage ground in Gravesend Bay, observing all possible care in so doing, was more prudent than to anchor in the channel contrary to the law, or to turn around and go back to find anchorage above the Narrows.

The argument, that inasmuch as the pilots of the

Werra and the *Advance* and the *Seneca* and the *Hamburg* steamer, and of the *Ailsa* herself, deemed it prudent in a similar condition of the weather to go through the Narows, therefore the pilot of the *Bourgogne* was not imprudent in doing the same thing, is unanswerable.

The Court will not undertake to declare a judgment as to what was prudent navigation, contrary to the actions of six pilots, one of whom was the pilot of the *Ailsa* herself.

Moreover the views of the pilots, as shown by their actions, agreed with the view of the owners of the *Ailsa* and of their counsel, as expressed in their libel.

That libel contained the allegation "that upon approaching the Narrows the *Ailsa* ran into a fog. After consultation between the captain and the pilot it was deemed imprudent to continue any further, owing to the increasing density of the fog" and thereupon the *Ailsa* anchored where she did. Inasmuch as the allegation was also made that the *Ailsa* was entirely free from fault, the above was a statement on their part of what were the requirements of prudent navigation. Now, this language is as fitting for the case of the *Bourgogne* as for the *Ailsa*. The *Bourgogne* "upon approaching the Narrows ran into a fog" as the *Ailsa* is alleged to have done. On the *Bourgogne* there was the same consultation between the captain and the pilot, which is alleged to have occurred on the *Ailsa*. The same conclusion was arrived at on both vessels, that it was imprudent to continue. The *Ailsa* thereupon proceeded through the Narrows until she was about half a mile below Fort Lafayette, and so did the *Bourgogne*. The navigation of the two vessels thus far was identical. The difference between the two was that the *Ailsa* anchored before she reached anchorage ground, whereas the *Bourgogne* was endeavoring to reach the anchorage ground before she anchored. This action on the part of the *Ailsa*, and the allegations of her pleadings, would seem to be a sufficient answer, of itself, to all that part of the argument on behalf of the

Ailsa which seeks to charge the *Bourgogne* with fault for not anchoring above the Narrows, upon the untenable theory that a vessel is bound to anchor as soon as fog sets in, even though she is in the channel-way and not on anchorage ground.

We apprehend that that proposition of law cannot be successfully maintained, that a vessel must anchor before reaching a fog, or that she is bound to anchor instantly when fog sets in, even though she is in the channel. The language is cited by the *Ailsa's* counsel from Marsden that a vessel in such weather should bring up "on the first opportunity." It could hardly be held that that language called for the anchoring in a forbidden channelway. The case of *The Blue Bell* arose under the Thames Regulations of 1880, which seem to allow vessels to anchor in the fair way in a fog (Prob. Div., 1895, p. 242, note), and do not seem to provide anchorage grounds as our Regulations do. And the case of *The Otter*, which Justice Bruce (not Le-Jeune) cited as authority for his statement, only held that where a steamship, *whilst in a good and well known anchorage ground*, enters a dense fog, it is her duty to anchor at once. The case of *The Raleigh*, 41 F. R., 527, was a case of a collision in the Hudson River, and there was no pretense of a violation of a Regulation as to anchorage ground in the case. Furthermore the Court found that *The Raleigh* could have safely anchored at the Englewood dock. The case of *The John Adams*, 1st Clifford, was a case of a collision between a ferryboat and a vessel at a pier. The ferryboat had run into a fog while making her passage and was held in fault for proceeding at too great a speed and not having a good lookout. But there is no suggestion in the case that she ought to have come to anchor.

The case of *The Alberta*, 23 F. R., was not a question of anchorage at all. The case of *The Alva* was one where there was no regulation as to anchorage ground, and where the Court held that *The Alva* anchored where vessels were accustomed to anchor, and out of the line of the usual course of vessels;

and in the case of *The Buffalo* the Court found the same fact that the vessel was on proper anchorage ground.

It can no more be claimed that the *Bourgogne* should have anchored as soon as the fog set in thick, than it could be maintained that, if she was on the high seas, she should stop as soon as the fog set in thick. There is no such requirement of law or of prudence. The requirement is that she shall "go at moderate speed" in a fog wherever she is. And, as the Circuit Court said in the case of *The John Hopkins* (13 F. R., 188) of vessels navigating in a fog, "it is as certain that they were not required to lie to or anchor as that 'a moderate speed' does not mean *no speed at all.*"

FOURTH POINT.

The Bourgogne's speed was not excessive.

La Bourgogne is charged with fault in the libel of the Western Assurance Company in that she was running at excessive speed.

The District Judge thought she went down the Bay nearly to Fort Lafayette at nearly her full speed. We think she did not, and that it would not be difficult to show by a working out of her speed from distance, time, tide and number of revolutions that there was no excessive speed before that time. But it would be a waste of time and labor.

In the case of The *Frisia* (24 F. R., 497) a speed of 15 miles an hour in the harbor of New York was held not to be excessive.

(The case was reversed, 28 F. R., 249, but not on this ground.)

The *Bourgogne's* rate of speed as she went down the Bay is entirely immaterial. The only question of speed bearing upon the case is as to her speed at and just before the time when she discovered the *Ailsa*.

The evidence is conclusive that, at and before her seeing the *Ailsa*, there was no excessive speed. It is of several classes.

(*a.*) The tendency of witnesses to estimate the speed of a coming vessel too highly is general. And yet Capt. Morris of the *Ailsa* estimated the speed of the *Bourgogne* at two knots (fol. 436).

(*b.*) The time which elapsed between the sighting of the *Ailsa* and the collision, and the distance run in that time, show it.

1. The time was a minute or a minute and a half, by the evidence of all the witnesses who speak on the point.

About a minute and a half or two minutes. Ollivier, (fol. 1095).

A very short time after it. So to speak, no time. Clochet, (fol. 1107).

A minute—a minute and a half. Beziel, (fol. 1120).

The order to reverse was a minute and a half or two minutes before the collision. Rempler, (fol. 1608).

2. The distance at which the *Ailsa* was seen is estimated at 50 to 60 meters.

"Somewhere from 50 to 60 meters."
Lecouedic, (fol. 1020).
Hascoet, (fol. 1033).
Limpaler, fol. 1072.
Hede, fol. 1080.
Le Gall, fol. 1085.

55 or 60 metres.
Le Moine, fol. 1048.

50 or 60 yards.
Rabe, fol. 1061.

About 70 metres.
Olivier, fol. 1095.

As soon as I had given the three blasts I saw the masts about 50 metres—60 metres off.
Le Meur, fol. 1134.

About 60 metres.

Poirot, fol. 1221.
Gicquel, fol. 1359.

I don't suppose she was over 50 feet away when I saw her.

A. H. Murphy, fol. 1456.

This would make the average speed of the *Bourgogne*, during the interval between sighting the *Ailsa* and the collision, about a knot an hour, her engines working back during most of the time (having been reversed as soon as the *Ailsa* was seen), and the tide of course carrying her forward all the time.

(*c.*) Before the *Ailsa* was seen the engines of the *Bourgogne* had been stopped for several minutes, so that she was moving, when the *Ailsa* was seen, only under her reduced headway and the force of the tide. And for some time before that her speed had been reduced by repeated stoppings.

The entry in the log of the *Bourgogne* is as follows (fol. 1811):

"At 2.05 intense fog—whistled frequently; maneuvred slowly in order to take anchorage. Perceived ahead a little to port a vessel anchored; backed at full speed; nevertheless at 2.10 we collided with this ship."

The entry in the engineer's log reads as follows (fol. 1398):

"Maneuvred slowly ahead. Stopped at 2.05. Astern full speed (repeated) 2.07. Different maneuvres up to 2.22."

And the evidence is that the words "maneuvred slowly ahead" mean moving the engine slowly ahead with occasional stops (Dalido, fol. 1423).

It is probable that there was a slight difference between the engine-room clock and the wheelhouse clock.

If there were not, the reversal of the engine at 2.07

would have been three minutes before the collision at 2.10, instead of a minute and a half or two minutes, as the witnesses estimate it. But a difference in time of a minute or two between the clocks is not unnatural or uncommon.

The evidence of the witnesses on this point is as follows:

CAPT. POIROT:

"The engine stopped going, and we were going very slowly" (fol. 1219).

"I had the engine stopped. I had it started again and had it stopped again in order that the ship shouldn't go ahead too fast" (fol. 1288).

REMPLER:

"We went ahead slow. I passed the order, 'Go ahead slow' and 'Stop.' I don't recollect very well how many times we did that.

Q. Do you mean those same orders several times? A. Yes.

Q. How long before the collision was the last order to stop given? A. I don't know exactly the number of minutes, but a good little bit of time (*un bon moment*) before we stopped)—a good length of time.

Before we saw the *Ailsa* we didn't see anything at all. It was quite a little while that we had already received the order to stop. * * * When we saw the *Ailsa* the engine was already stopped and had been '*depuis un bon moment*'" (fols. 1604–7).

A. H. MURPHY:

"When we got Fort Lafayette a point abaft our beam we stopped" (fol. 1452).

"When we passed Fort Lafayette I should judge the *Bourgogne* was going about four knots." (fol. 1476.)

(*d.*) Counsel for the Western Assurance Company, on p. 10 of his brief, arguing that the *Bourgogne's* speed was excessive, says: that "the blow was a severe one." This is an entire mistake. The evidence on this point is as follows:

SHOOK (fol. 249):

It was just a crush; that was all, and the *Ailsa* she

fell over to starboard and the *Bourgogne* kind of listed over the other way.

Captain Morris describes the collision at fols. 436–7 without a suggestion of any shock.

Cote, the mate, says nothing about it.

Nelson, at fol. 653, says "She crushed into us."

Tietgens, at fols. 714–15, speaks of the collision, and at fol. 718 he says, "As soon as *I heard* the crash." He does not even speak of feeling it.

Pearce, a passenger, fol. 769, says he "felt a tremor run through the ship."

Barclay, one of the engineers, fol. 956, simply says he "felt the collision."

Murphy, the second mate, fol. 1547, says: "If I was standing on one leg it wouldn't knock me off my balance."

And Russell, at fols. 1191–92, testifies as follows:

"Q. State whether or not the collision was a violent one or otherwise? A. It was not a violent one. She came very slowly, the same as the ship was stopped.

Q. Did you hear the crash of the collision? A. Yes, I heard the crash where I was standing.

Q. Did it make much of a noise? A. No, it didn't make much, it was more of a crush, didn't make much of a noise; didn't even stagger me, and I was standing in the middle of the deck at No. 2 hatch when she struck.

Q. It has been stated in the case that the collision was so violent as to cause the *Ailsa* to careen over? A. That is a mistake, sir; she didn't do that."

This evidence put together certainly shows that the evidence of Captain Poirot, that the *Bourgogne* was almost stopped at the time of the collision, is correct. The size of the wound proves nothing. If the *Bourgogne*, with her weight, was in motion at all, it would be sufficient to crush in the thin iron plates of the *Ailsa* wherever the vessels touched.

(*e.*) Unless the untenable ground can be maintained that the *Bourgogne* was not entitled to be in motion at all she was not in fault as to her speed. That speed was governed with extreme care. It is difficult to see

what more she could have done in reference to speed, unless she had come to anchor.

FIFTH POINT.

The Bourgogne was in no fault as to her lookout or the vigilance of her officers and crew.

(*a.*) On her bridge were Capt. Poirot, her Master, and Murphy, the Pilot, Rempler, the 3d Lieutenant, at the telegraph to the engine-room, Morice and Daniel, quartermasters, on the bridge to pass orders, Le Meur, a quartermaster, at the whistle ; and Beziel, a quartermaster, at the wheel.

On her forecastle were Gicquel, her Second Captain, with two special lookouts, Rabe and Clochet, one on each side of the bow, and the boatswain, Petiot, and seven sailors.

They are proved without contradiction, to have been looking out with vigilance and attention. There is no effort to prove the contrary.

They saw the *Ailsa* as soon as she became visible.

They heard the bell before the vessels came together.

None of them heard the bell before the *Ailsa* was seen.

(*b.*) The Court cannot hold, from the mere fact that the bell was not heard earlier, that there was a lack of vigilant attention on the part of the *Bourgogne*.

It cannot be believed that the bell of the *Ailsa* was in fact heard before she was seen. To believe that one would have to believe that the sixteen witnesses from the *Bourgogne* had all committed perjury.

And it is manifest that the mere fact that the bell was not heard might have been due to either one of three causes, viz. : Either (1) the bell was not rung from the time that the *Bourgogne* came within the scope of its being heard, till after the *Bourgogne* was in sight, or

(2) the sixteen men on the forecastle and bridge of the *Bourgogne* were all of them struck with a simultaneous lack of attention, or (3) there was something in the condition of the atmosphere or the position of the bell on the *Ailsa*, which prevented its being heard.

The second of these hypotheses may be disregarded as incredible.

If the third be assumed as the cause, it discharges the *Bourgogne*, as well as the *Ailsa*, from any charge of negligence, because if the atmosphere was such as to prevent those on the *Ailsa* from hearing the whistle of the *Bourgogne*, *a fortiori* would it prevent the men on the *Bourgogne* from hearing the bell on the *Ailsa*.

There remains the first hypothesis, viz.: That by reason of carelessness on the *Ailsa*, the bell was not rung during that period.

This hypothesis we will discuss later, when we consider the faults alleged against the *Ailsa*.

It seems sufficient, as far as the *Bourgogne* is concerned, that there was no lack of vigilance on her part. No one can believe that, while sixteen men were unable to hear any bell from the *Ailsa*, a greater number would have heard one; or that all of the sixteen men were suddenly attacked by a simultaneous lack of diligence.

Their failure to hear the bell of the *Ailsa* is much more likely to have occurred by reason of her failure to ring the bell at the particular time in question, or by reason of some peculiarity of the atmosphere or the position of the bell (see Diagram), than by reason of a unanimous failure of sixteen men to give to the navigation of the ship that vigilance which they were especially set to give. In fact the witnesses to the lookout on the *Bourgogne* are so numerous that it is rather a matter of surprise that the counsel of the *Ailsa* does not find fault with the *Bourgogne* for having too many men on the lookout, as he seems inclined to find fault with her for blowing her whistle too often. (Brief, p. 42.)

And whether the fact that the bell was not heard was due to the fact that it was not rung at that partic-

ular time, or to some condition of the atmosphere which made it inaudible to all the sixteen witnesses, in either case the *Bourgogne* is equally free from fault in not hearing it.

The counsel for the appellants claim that in addition to all the lookouts forward the *Bourgogne* shonld also have had a lookout in the crow's nest, and is in fault for not having had one there, because, as their brief says (p. 20), "It is altogether probable that a lookout there might have descried the masts of the *Ailsa* in time to avoid a collision."

It is true that the masts of the *Ailsa* were seen from the *Bourgogne* before her hull was, but that was not by reason of any difference in the density of the fog. The fog was not perceptibly heavier on the water than it was at the height of the masts. "There was no appreciable difference." (Capt. Poirot, fol. 1346.) He testifies, also that the fact of his being higher gave him no advantage; that he could not see the sky overhead because it was raining; that the reason why the masts of the *Ailsa* were seen before the hull was, was because the masts were of a color that is more easily seen than that of the hull, the masts being of a reddish yellow and the hull gray (fol. 1344).

There is no evidence in the case that a man placed in the crow's nest 40 feet 8½ inches from the deck could have seen the *Ailsa* any earlier than she was seen.

The appellants' counsel only venture to claim that that is "probable." That is small ground on which to hold the *Bourgogne* in fault, in view of the positive evidence in the case, and in view of the extreme precautions which were actually taken on board of the *Bourgogne*.

The charge of lack of vigilance made against the *Bourgogne* is therefore abundantly disproved.

SIXTH POINT.

The Bourgogne's whistle was properly blown.

The complaint, not alluded to in the pleadings, and not specifically charged in the briefs, that the whistles of the *Bourgogne* were blown too often, has no other foundation than the imagination of counsel who has quoted the words "as one might say, almost continually" in the report of the master, omitting the words, "according to law, at very short intervals." The evidence as to the frequency of the blasts of the *Bourgogne* is that they were blown at intervals of less than a minute, varying from twenty to forty seconds.

Capt. Poirot says the whistle was blown probably every twenty seconds, perhaps oftener (fol. 1252). He explains (fol. 1619) what he meant by "presque continuellement," and adds: "It is perfectly evident that I didn't have that whistle blown in such a manner that I couldn't hear what was going on."

Le Meur, who blew the whistle (fol. 1130) says: "The commandant gave me orders to whistle every thirty or forty seconds, and I did so."

The estimates of the other witnesses agree with this.

It seems to us that it is a very violent assumption to claim that the bell of the *Ailsa* was not heard because the whistle of the *Bourgogne* was blown too often. It might about as well be claimed that the whistles of the *Bourgogne* were not heard on the *Ailsa* because the bell of the *Ailsa* was rung too often.

The witnesses from the *Ailsa* use the same word "continually" which Capt. Poirot used in his report. (Morris, fol. 435; Tietjens, fol. 726).

SEVENTH POINT.

There is no presumption of fault against the "Bourgogne," because she went on and anchored after the collision.

Counsel for the *Ailsa* claims that there is a presumption against the *Bourgogne* from the fact that, as he says, she "backed away from the sinking vessel, rendered her no assistance, and left her to her fate." He refers to the statute (26 Stats. at L., p. 425) which he says "formulates a reasonable rule of law which the Courts recognized before the statute." The words of the statute are that "In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel to stay by the other vessel until he has ascertained that there is no need of further assistance, and to render to the other vessel, her master, crew and passengers, such assistance as may be practicable, and as may be necessary, in order to save them from any danger caused by the collision." Capt. Poirot maneuvred his vessel so as, while avoiding a second collision, to keep her in about the same place (fol. 1226) and he anchored the *Bourgogne* within half a mile of the place of collision. It seems to us idle to claim that a vessel does not "stay by" another which under such circumstances anchors within half a mile of her.

As to any assistance that the *Bourgogne* could have rendered, there is no suggestion that any assistance whatever was practicable. Nor was it. The *Ailsa* was ashore, as it is claimed by the *Ailsa's* counsel, before the *Bourgogne* came to anchor. As soon as the *Bourgogne* did come to anchor her boats were put out in readiness to render assistance, if any should be practicable. But, as above stated, no assistance was practicable. The counsel for the *Ailsa* cites three cases, the *Atlas*, the *America* and the *Adriatic*. A glance at those cases will show that there is not the slightest parallel between them and the present case. Capt. Poirot's first duty was to bring his vessel to a safe

anchorage. If ever there was a violent presumption it would be a presumption that the pilot of the *Bourgogne* was desiring to get away in secrecy or had any idea that it never would be known that the *Bourgogne* had been in collision with the *Ailsa*, or that any presumption of fault is to be drawn from the action of the *Bourgogne* in coming to anchor.

EIGHTH POINT.

The Bourgogne was free from fault in every particular.

We find, then, that the navigation of the *Bourgogne* was as follows:

She had an abundance of men on the lookout. She had competent and skillful navigators on her bridge. The weather was rainy when she started. As she went down the Bay it was found that there was a fog below, the fog being thicker on the Staten Island than on the Long Island side of the channel, so that the shore of Long Island was visible for a considerable distance.

As she went into the fog her engines were slowed and stopped. The fog thickening after she passed Quarantine, the master and pilot determined to anchor, and thereupon determined to seek the anchorage of Gravesend Bay for that purpose, taking the same course of action which was pursued under similar circumstances by the *Werra*, the *Advance*, the *Seneca*, the Hamburg steamer, and by the *Ailsa* herself, and presumably by the five or six other vessels which were anchored in Gravesend Bay to the southward and eastward of the *Werra*, all of which had gone down before.

Her engine was stopped, and from that time she proceeded at as low a rate of speed as was consistent with keeping her under adequate control, her engines being alternately stopped and started ahead slow for that purpose. At the time when the *Ailsa* was seen,

her engines had been motionless for about two minutes.

While so navigating, and before she had reached the anchorage ground, she sighted the *Ailsa*, which was at anchor so far out in the channel that all the other vessels which are known to have gone down the Bay after her went to the eastward of the place where she was anchored. The bell of the *Ailsa* was not heard, either because it was not rung, or because of some peculiar condition of the foggy atmosphere, until after the *Ailsa* was seen. And as soon as she was seen at the distance of 150 or 200 feet she was reported and the engines of the *Bourgogne* were at once reversed, her speed being at that time already so low that it took a minute and a half after the *Ailsa* was seen before the vessels came together.

It is not possible to charge the officers of the *Bourgogne* with negligence or with the failure of any duty. The collision with the *Ailsa* was not to be avoided by any care or vigilance on their part. The master of the *Bourgogne* was obeying the law in seeking to anchor out of the channel; and in reaching such an anchorage his vessel was navigated with all possible care and skill. The accident, so far as the *Bourgogne* was concerned, was one which could not be avoided. And the *Bourgogne* is entitled to be discharged from this suit on the ground that no fault is established against her.

NINTH POINT.

The Ailsa was anchored in an improper place in violation of law.

If we come to consider the faults of the *Ailsa*, our first claim is, that she was anchored where she was forbidden to anchor by the Treasury Regulations; that is, that she was anchored west of the line running from Buoy 18 through the east side of Fort Lafayette

to the East channel between buoys 2 and 4. In fact, we claim that she was anchored about midchannel.

(*a.*) The first statement, as to her place of anchorage, that appears in the case, was the one made by her pilot, Shooks, in his report to the Pilot Commissioners (fol. 324), in which he stated that the *Ailsa* was at anchor "off Gravesend Bay" at the time of the collision. He did not say that she was at anchor *in* Gravesend Bay, but *off* Gravesend Bay.

The next statement made, as to the anchorage of the *Ailsa*, was in her libel, in which it was alleged that the *Ailsa* "left the midchannel" and was anchored "as close to the Fort Hamilton shore as was deemed prudent in order to be out of the way of vessels proceeding through the Narrows" (fol. 16).

> The absence from that libel of any allegation that the *Ailsa* was anchored on anchorage ground or outside of the channel prescribed by the Treasury Regulations, is in entire accordance with the statement of the pilot above named, and with our claim that the *Ailsa* was anchored in the channel.

The next statement, as to the anchorage of the *Ailsa*, appears in the answer of the owners of the *Ailsa*, in which still there is no allegation that the *Ailsa* was anchored out of the channel, although the libel of the owners of the *Bourgogne* against her had explicitly charged, as one of the faults claimed against her, that she was anchored in the channel, in violation of the regulations. Nevertheless, the owners of the *Ailsa* confined themselves in their answer to the allegation that she was lying at anchor "at a point considerably to the eastward of the customary path of vessels going through the Narrows and was anchored in a perfectly proper and safe place." And they made the further allegation that "the place of anchorage chosen was, in the judgment of the master and pilot of said *Ailsa*, the safest and best place for an anchorage, having in view the depth of the water, the liability of collision

with passing vessels, and the danger owing to the sudden shutting in of the fog of continuing under way much longer."

This allegation in the answer of the *Ailsa* must be taken to be the final claim of her owners, as to the place of her anchorage.

(*b.*) The District Judge found that the *Ailsa* was not anchored on the anchorage ground prescribed by the Treasury regulations. His opinion is so full and so forcible as to this fact that we do not think it necessary to trouble the Court in this brief by going over again the ground which he has covered. But, referring to his opinion (fols. 1824–1848) we will only answer some of the criticisms which are made by counsel of the appellants upon that opinion.

(*c.*) The counsel for the Western Assurance Company claims in his brief to have pointed out material errors of fact and errors of computation in the opinion of the District Judge, which should invalidate his conclusion.

(1.) The counsel says: "There is no intimation in the proofs" that the distance at which the *Ailsa* passed Fort Lafayette may have been more than 100 yards. This is an error. The libel of the *Ailsa* alleges that, *after a consultation* between the captain and the pilot, they deemed it prudent to continue no further, owing to the increasing density of the fog, and that the ship "*thereupon* left the midchannel." This is clearly an allegation that up to the time when the pilot and captain determined to anchor, the *Ailsa* was about midchannel.

Now, Captain Morris testifies (fols. 423–4) that this decision to anchor was "after passing Fort Lafayette, I may say about two or three minutes." And in answer to the libellant's counsel, at fol. 427, he repeated that evidence.

> "Q. How soon after you passed Fort Lafayette did you decide to anchor? A. It must have been about two or three minutes."

It follows from this evidence, therefore, that the *Ailsa* passed Fort Lafayette in midchannel.

Again, the pilot of the *Ailsa* testifies that when they passed Fort Lafayette the *Ailsa* was steering "South by East, as near as I can make it out."

(fols. 307 and 309):

"We kept that course until we stopped, until the engines were stopped altogether"

And therefore at the time the *Ailsa* passed the fort, no change had been made in the course which she had kept above Fort Lafayette.

Furthermore, the pilot testified (fol. 231) that he could "just see the loom of Fort Lafayette as we passed it," while the captain testified that he could "faintly see Staten Island, that is Fort Tompkins" (fols. 421–2). And Cote, the mate, says he could not see Fort Lafayette at all, though he heard the bell from it (fol. 576), and says that before they swung to their anchor the bell from Fort Lafayette was *not astern, but on the port quarter* (fol. 579). This evidence concurs with the allegation of the libel to prove that instead of passing within 100 yards of Fort Lafayette, the *Ailsa* was about in the middle of the channel, which is there 4,000 feet wide.

We maintain that the District Judge, in saying that the *Ailsa* passed Fort Lafayette, "as her officers estimate, only 100 yards to the westward of the fort, though the distance may have been more than that," made a finding very much more favorable to the *Ailsa* than the testimony warranted.

(2.) The counsel says that "the Judge was in error in assuming that the *Ailsa* was running for any time on a south-southwest course." But the words of the District Judge's opinion are, "How long or far the *Ailsa* had been running on a course of south-southwest magnetic, it is impossible to determine." The District Judge took the statement of Shook, the pilot, and has fairly reported it in that part of his opinion (fols. 1827–1830).

(3.) Counsel argues that the "District Judge was in error in throwing in half a point of deviation against the *Ailsa*," and holding her course to have been S. ½ E., because, he says, Capt. Morris testifies that "in testifying to courses he referred to corrected courses" (fol. 534). So Morris did, but he gave the true course of the *Ailsa* as south ½ east (fol. 425); so that the District Judge was entirely correct.

(4.) He says, "The District Judge is in error in assuming that the engines of the *Ailsa* were not stopped until three or four minutes after passing Fort Lafayette," because Morris testified at fol. 485 that he determined to anchor "one or two minutes after passing the fort." But he overlooks that Morris at fol. 427 says that when he determined to anchor it must have been "two or three minutes after he passed Fort Lafayette."

> And Shook at folio 315 was asked, "How many minutes did you go after passing Fort Lafayette before you stopped the engine for the first time? A. Only a few minutes, three or four minutes, or three minutes. It could not have been any more than three minutes or four minutes."

The District Judge, therefore, was entirely correct in stating that the engines of the *Ailsa* were not stopped until three or four minutes after passing Fort Lafayette.

(5.) Counsel says that the District Judge "fell into error in reference to the bearing of the bell on Fort Lafayette from the *Ailsa*, by taking no account of the deviation of the compass." But Capt. Morris testified (fol. 431) that the *Ailsa*, when at anchor, lay with her bow about north by west, or northwest with the ebb tide, And at folio 493 he repeats that she lay about north by west or north by west ½ west. And these were meant as being the correct courses, as counsel for the Assurance Company has pointed out (Morris, fol. 534). This heading agrees with the heading of the vessel, as given by the pilot. And the pilot testifies (fol. 282) that on

that heading the bell of Fort Lafayette was about two points on his starboard bow. Hence there was no error in the opinion of the District Judge on this point. The remark of counsel that "If the deviation of the *Ailsa's* compass on northerly courses was the same as on southerly courses, the bearing of the bell would indicate that the *Ailsa* was within the anchorage limits," is very extraordinary. By no possibility could she have been within the anchorage limits if the bell bore north by east, or even north from the *Ailsa*.

(6.) The counsel says that the District Judge did not refer to the fact that, (as he says,) "any point south southwest from Fort Hamilton, and not more than half a mile south of Fort Lafayette would be within the anchorage grounds." Truly the District Judge did not refer to it, because the fact is otherwise. A point half a mile below Fort Lafayette south southwest from Fort Hamilton would be 250 yards outside the anchorage grounds.

(*d.*) The counsel for the *Ailsa* presents in his brief (pp. 27–34) some considerations which, as he claims, show that the *Ailsa* was anchored on anchorage ground.

(1.) He says that the *Ailsa's* movements show that the *Ailsa* passed not over 300 feet from Fort Lafayette and he says that the courses which he gives would have brought her on anchorage ground. But, in the first place, the evidence, as we have shown, is very strong that the *Ailsa* did not pass within 300 feet of Fort Lafayette. And, in the next place, if she did, running on the courses which her pilot gave would not bring her on anchorage ground, as the District Judge shows.

(2.) He claims that the pilot of the *Ailsa* was of the opinion that she was on anchorage ground. But her pilot would not testify that that was his opinion. All he would say was that "We were on the eastern side of the channel. I cannot exactly state whether we were on the inside of the line, or on the line, because there

was a dense fog; but we were somewhere on the line, or near the line."

How could the pilot give an opinion as to which side of the anchorage line he anchored, when he was compelled to concede that he did not know the direction of the line below Fort Lafayette? He said (fol. 321) that the line was drawn "outside of Fort Lafayette," which it is not. It is drawn from the east side of Fort Lafayette. And he did not know where it ran below (fol. 323).

(3.) He says that Cooley of the *Harold*, at fol. 358, says he thought she was pretty well over to the eastward. But he does not refer to Cooley's evidence at folio 346. "She got under way, started to go *across the channel to make Gravesend Bay if she could.*"

(4.) He says, "the depth of water shows it, and that this is fixed definitely."

And he claims a depth of water of only about 48 feet. But the weight of evidence is manifestly that the depth of water was over 66 feet, a depth not to be found on any part of the anchorage ground. Capt. Morris testifies that when the anchor touched bottom the 15 fathom shackle was on deck, and that the distance from the windlass to the water's edge was about three or four fathoms, "having 10 or 11 fathoms under water" (fol. 430). Cote, the mate, gave the same evidence (fol. 549). This is claimed to be overborne by the evidence of Thompson, the Dock Superintendent, who said that he had measured on the plan the distance from the windlass to the hawse hole and from there to the water, assuming the draft to be 20 ft., and that the distance was about 7 fathoms. No such distance can be arrived at by a measurement of the plan. The windlass was on the main deck (fol. 532), and no distance of over 20 feet can be measured on the plan from the windlass to the water's edge, if the vessel drew 20 feet of water. And, deducting 20 feet, or even 24 feet from the 15 fathoms, would give a depth of water of 11 fathoms or 66 feet, which is the depth of water testified to by Capt. Morris at folio 430.

(5.) He says that the movements of the *Bourgogne* indicate that the *Ailsa* was on the east side of the channel. But this is a great mistake. Capt. Poirot testifies that when the fog became thick the *Bourgogne* was abont in the middle of the channel to go through the Narrows, heading south 11° east (fol. 1217). And at fols. 1253–1263 he testifies to the same effect at greater length. Now there is no question on the evidence but that the heading of the *Bourgogne* had not been materially changed from that time until the collision. Hence if we take a point about midchannel at the Narrows and draw a line from it south 11° east, that line will pass through or very near to the place of collision; and it is far away from the east side of the channel.

(6.) As to the movements of the *Ailsa* after the collision, the language of the District Judge is that "Almost any estimate of the time and distance traversed can find some support in the evidence." Counsel for the *Ailsa* has selected evidence which declares that the distance was short. A reference to the following folios will furnish abundant evidence to show that it was long.

Shooks' report stated the time as fifteen minutes (fol. 325). And see Cote, fols. 563 and 566; Nelson, fol. 663.

The *Ailsa's* full speed was 10 to 12 miles an hour. If she got even three minutes of full speed she would have run half a mile before she sank. The counsel, at page 32, says that "The brevity of the time after the collision is best expressed by Capt. Cooley of the *Harold*, that he didn't have time to take anybody on board before she sank."

But this is not a correct statement of Capt. Cooley's testimony. Capt. Cooley says that he did not have time to take anybody on board "*when the vessel grounded*," and he had to cast off the line to protect his own crew and boat. But even Cooley says that the *Ailsa* "after she started to go across the channel (fol. 346) sailed about, I guess, three or four minutes,

probably less than that, before she was stopped by the ship ahead"; and that from the time of his being hailed, which was some time after the collision, till the *Ailsa* ran aground could not be over eight or ten minutes at the most.

(7.) The counsel says that "one or two witnesses are of the opinion that the *Ailsa's* head was at the northeast when she struck." The "one or two witnesses" of whom he speaks are: Shooks, the pilot, who says that when the *Advance* was right ahead of the *Ailsa* she bore about northeast from him (fol. 257), (so that the *Ailsa* had then been running long enough to change her course from north by west to northeast, in conformity to the pilot's order), and Morris, who says that at the time when she settled down forward she was going northeast (fol. 441). There is no evidence whatever of any other heading of the *Ailsa* when she sank. It is utterly incredible that the *Ailsa* could have made the change of heading of five points in making the little northing and easting which is described on the chart attached to the counsel's brief.

(*e.*) One further consideration may be added to the many matters set forth in the opinion of the District Court to sustain the conclusion that the *Ailsa* was not anchored on anchorage ground.

The *Ailsa* as she lay at anchor headed N. by W.

The *Bourgogne*, as she passed Fort Lafayette headed S. by E. which is the opposite course. And she was then about in midchannel.

Now, if the *Ailsa* was not about in midchannel, but on anchorage ground or even on the eastern side of the channel, the *Bourgogne* could not have reached her without having changed her own course and gone over to eastward; and the angle of the heading of the two vessels at the collision would be the angle of that change of course.

But whatever change to eastward the *Bourgogne* had made under her ported helm had been offset by

her change to westward under her starboarded helm (her starboard helm turned her head to starboard), for when she struck she was on the same heading of S. by E. and the vessels struck stem on.

This is the testimony of Ericson, the diver, called by the libellants, who went down to examine the wound in the bow of the *Ailsa*, and who testifies positively to this effect. (Folio 1774): "My judgment was, the direction of the collision was from stem to stem." (Fol. 1775): "My judgment is that the collision took place head on." (Fol. 1776): "That is my opinion yet. My opinion is that it was head on, and I adhere to that view about it." (Fol. 1784): "Q. When you say that the blow was head on, do you mean by that exactly head on, or to either side from head on. A. I mean both vessels came together as near as they could right stem on to each other." (See Shooks, fols. 246–7.)

The line on the diagram which is marked "Angle of Collision" was put on, as it appears, by the draftsman, Reussner, who made it according to somebody's direction, and testified that it is "mere imagination." (Fol. 1765.)

(*f*.) Some further considerations may be added. The *Werra*, which came down shortly after the *Ailsa* anchored, went to the eastward of the *Ailsa*. The *Bourgogne*, which came next, came in collision with the *Ailsa*. The *Advance*, which followed shortly after, also went to the eastward of the *Ailsa*. The *Seneca* and the Hamburg steamer which came afterwards, also anchored further east than the *Ailsa*. The six or seven other vessels which were anchored at various places from the position of the *Advance* to that of the *Campania*, more than a mile below, were all to the southward and eastward of the anchorage of the *Werra*, and therefore still farther to south and east of where the *Ailsa* anchored. And no vessel is claimed to have gone down to the westward of the *Ailsa*, except one which Shook testifies passed down close to the port side of the *Ailsa*, and anchored on her port quarter,

although, when the fog cleared up, no such vessel was found in that locality at all. All these facts taken together, are sufficient to demonstrate that the claim of the owners of the *Ailsa* that she was anchored "considerably to the eastward of the customary path of vessels," is not sustained, but that on the contrary, she was anchored right in the path of vessels.

Whether this place of anchorage was, as is alleged in the answer of the *Ailsa*, a "safe and prudent one," or whether it was an anchorage in the channel, to be excused by reason of the emergency of the case, are questions which also can be disposed of by a few simple considerations.

The fact that all these other vessels, which may be presumed to have been navigated by careful navigators, anchored farther to the eastward than the *Ailsa* did, may be well deemed to show their judgment that an anchorage farther eastward was the more prudent; and this Court may well follow, as the District Court did, the judgment of these navigators.

The *Ailsa* drew twenty feet depth of water (Morris, fol. 473), whereas the *Bourgogne* drew 27½ feet (fol. 1697). The *Werra* presumably as much as the *Bourgogne*. The *Advance* drew 17½ feet, and anchored far to the eastward of the *Ailsa's* anchorage, and yet was in eight or ten fathoms of water (fols. 1659, 1695). There was, therefore, nothing whatever to prevent the *Ailsa* from going farther to the eastward and anchoring out of the channel, unless the claim of the pilot of the *Ailsa* is to be believed, that he anchored where he did, because he heard the bells of other vessels lying at anchor to the eastward and southward of him, and so near that he did not dare to go farther. But that story cannot be true. The *Werra*, which passed the *Ailsa* as she lay at anchor, anchored at least half a mile below and to the eastward of the *Ailsa;* and when the fog cleared up an hour or two afterwards, there were no vessels found nearer the place where the *Ailsa* anchored than the *Werra*. It is perfectly plain, therefore, that the *Ailsa*, instead of anchoring where she did, might have kept on to the eastward and southward for more

than half a mile before she could have approached any of the vessels that were actually at anchor when she came down. It was the duty of the pilot of the *Ailsa*, when the fog came down, to take her out of the channel upon anchorage ground before anchoring. If he had done so this collision with the *Bourgogne* would not have happened. And that he could prudently have done so is demonstrated by the above facts, which cannot be disputed.

No satisfactory reason is given by the pilot of the *Ailsa* for anchoring when and where he did. He says (fols. 232-5) that when he anchored "we could hear signals pretty much all around us in fact, south of us. There was whistles and bells. All we heard on the port bow, we heard a whistle on the port bow" (but he corrects this at once, and says it was on the starboard bow; and see fols. 261–2); and he adds: "I heard a whistle and bells. I could not say plainly where I heard them. I heard so many bells ahead of us, and whistles, that we immediately came to anchor; we was afraid to go further."

Now, the fact that no vessel was at anchor on his port bow at the time, and that the *Werra*, which came down after him, as Shook himself testified (fol. 282), found anchorage a long distance to the southward and eastward, with no other vessels near her, proves that the pilot's evidence on this point is not correct, and that the excuse which he seeks to give for anchoring at that spot did not exist.

Capt. Morris gives no such excuse for anchoring there. He says that after he anchored he heard bells on the port side of the *Ailsa* and astern (fol. 443). But no vessels appeared there when the fog cleared up.

The position of the *Bourgogne* at anchor was carefully fixed by Capt. Poirot the next morning (fol. 1244), and he gives the position of the *Werra* as about abreast of him, and about 300 or 350 metres to the eastward. And all the witnesses who speak on that point agree with him. He also states, to the best of his judgment, the position of the other vessels at anchor. And there

is no contradictory evidence. (See his diagram at p. 312.)

All this shows, as we have already said, that the excuse set up by the *Ailsa* that she was compelled to anchor where she did, by the near presence of other vessels at anchor, is not founded in fact.

TENTH POINT.

The Ailsa had no lookout and was shorthanded.

Another fault on the part of the *Ailsa* was that she had no lookout forward, as is the undisputed fact.

The *Ailsa* was also shorthanded, and had not a sufficient watch on deck.

This is a grave fault.

> The *Clara*, 102 U. S., 200.
> O'Neil *v.* Sears, 2 Sprague, 52.

The allegation of both her libel and her answer is that she had a lookout forward and a lookout aft, and a man ringing the bell, all which, of course, due vigilance would have required her to have. But it is proved by the evidence of Santos, the man who claims to have been at the bell (and he is not contradicted) that there was no one on the forecastle deck at all after 2 o'clock. In fact no orders were given to station a lookout forward. Cote, (fol. 592).

This was beyond question a lack of the vigilance which the circumstances of the case required. Nor can it be successfully claimed that this was a negligence which did not contribute to the collision. It is manifest that a man on the forecastle deck, engaged solely in looking out, should have, and in all probability would have, heard the whistles of the *Bourgogne* as she approached, as Russell did hear them, (Russell, fol. 1184, and see Murphy, fol. 1546), and would have warned the officer

on the bridge, so that he would have known that a steamer was approaching long before she appeared through the fog. As a matter of course, if that had been the fact, his attention would have been specially called to the bell, and he would have made sure that the proper signal, by the ringing of the bell, was in fact being given; and there would be in the case no such question as to whether or not the bell was actually rung, as is now found there.

ELEVENTH POINT.

The Ailsa was also in fault in that her bell was not ringing during the near approach of the Bourgogne.

No doubt there are several witnesses from the *Ailsa* who testify generally that the bell of the *Ailsa* was rung, from the time of the anchorage of the *Ailsa* till the collision, at very short intervals. But it is to be noticed that the exact question in issue in this case is whether the bell was rung during the four or five minutes before the *Ailsa* was sighted from the *Bourgogne*. And no witness from the *Ailsa* is able to speak specifically of that time, because no one of them was aware of the approach of the *Bourgogne* until she came in sight. In fact, therefore, this question must depend mainly upon the weight to be given to the testimony of the man who is claimed to have been at the bell, and of the officer who is claimed to have been upon the bridge during this particular time. And, as to both these witnesses, there is a discrepancy in the testimony of the *Ailsa* which casts suspicion upon their evidence.

(*a.*) It is to be noted that, if there were in fact lack of attention on board of the *Ailsa*, that would account both for the fact that the bell was not rung, as we claim, which is contested, and for the fact that the

whistles of the *Bourgogne* were not heard, which is not contested.

But this fact, that no whistle was heard by any one on the *Ailsa* who was charged with the duty of vigilance, calls for explanation from her. None is furnished. It is suggested by counsel for the *Ailsa* that the whistles were heard, but were not distinguished from other whistles in that locality. But the evidence will not admit of that explanation.

It is only claimed that there were two men on the *Ailsa* charged with any vigilance, the man at the bell and the officer on the bridge. Whether this officer was the first mate, Cote, or the second mate, Nelson, is disputed between them.

Cote says that Nelson was away from the bridge for the ten minutes before the collision, which would cover the time in question. He says: "After ten minutes were over he (Nelson) came and relieved me again and I went down on the lower bridge. As I went down on the lower bridge I saw the bow of a steamer coming for us" (fols. 554, 608).

There is great confusion in Nelson's evidence on this point. He says the chief mate relieved him before 2, so that he was back again on the bridge by a quarter before two (fol. 685), (which would put him on the bridge twenty-five minutes before the collision), and yet he says he is under the impression that he resumed his place on the bridge between 5 and 10 minutes before the collision (fols. 686–7.) He says that he turned the men to at 2 o'clock, and that was both after and before the first mate relieved him (fol. 690.)

Cote's evidence is the best on this point. Nelson's evidence would leave Cote unaccounted for, for from 10 to 25 minutes before the collision. Cote's evidence accounts for him and puts him on the lower bridge when the *Bourgogne* came in sight. He himself says he was there, and that he "made a motion to call the captain, who was in the chart room, but that the pilot got in before me" (fol. 559.)

But whether it were Nelson or Cote who was on the

bridge at this time makes little difference, for each of them testifies that he heard no whistles.

The evidence of these men is positive that they heard no whistle of the *Bourgogne* at all, and so is that of the men who are claimed to have rung the bell.

COTE, (fol. 555.)

During that time (from the time we anchored till I saw her), I heard some bells astern, and I think bells on the port side and whistles. There was whistles nearly all round—vessels moving about. * * * I heard a number of whistles passing while we were at anchor.

(fol. 609.)

When I saw her bow, that was the first I saw of her or heard of her.

(fol. 636.)

I could not tell if whistles of passing steamers were on tow boats or larger vessels.

NELSON, (fol. 649.)

I heard bells of vessels that were at anchor on my port bow, and I heard steam whistles, two that were coming from steamers, which passed us, one on each side. (See also fol. 678.)

(fols. 678, 680.)

I did not hear any whistles from the *Bourgogne*—none right ahead.

(fol. 652):

The first I saw or heard of the *Bourgogne*, I saw something red appearing out of the fog close ahead.

VITOLANE (fol. 902):

While I was ringing the bell I heard no sound or signal, whistle or bell. I didn't hear anything.

SANTOS (fol. 908):

I didn't hear anything.

The explanation offered by the *Ailsa's* counsel (Brief, p. 44), viz.: that the whistles were heard, but were not distinguished from other whistles, is therefore

contrary to the evidence of all these men. And there is no other explanation of the fact than that either some state of the atmosphere prevented the whistles from being heard, or else there was a lack of attention on the part of those charged with the care of the *Ailsa*. And if there was such lack of vigilance in listening for the approach of vessels in such a dense fog, there may well have been the same lack of vigilance in the giving of notice by the bell.

(*b.*) If the attention of a man on the forecastle head, or the attention of the officer on the bridge had been called to the approach of the *Bourgogne*, by hearing her whistle, as Russell did (fol. 1184) several times, coming nearer and directly for the *Ailsa*, his attention would at once have been called to the question whether the bell was *then* being rung as it should be; and he would have been able to have testified, if such had been the fact, that the question of the bell was *then* presented to his mind by his hearing the approaching whistle, and that he *then* saw the man at the bell and heard it rung repeatedly while the whistle was approaching. But no such evidence is furnished by any witness. They all testify generally that the bell was rung at short intervals from the time the *Ailsa* anchored till the collision. But no one can say that his attention was specially called to the matter at the critical time.

That is just one of the circumstances in which the presence of a special lookout is to be desired. And the absence of a lookout, who could give evidence on such a point, has been in some cases especially commented on by the courts.

(*c.*) The evidence as to the man at the bell is quite conflicting.

Cote says first (fol. 551): "Everybody was at their station then. The second officer was on the upper bridge, one man at the bell, and the other two men were busy about the deck."

On cross-examination he says (fol. 585) that he left

Smith on the forecastle deck, and stationed (Cellentali) Vitolani at the bell, and that (fol. 589) he saw neither of them after that till the collision, though he thought the men were changed afterwards, when he was not on deck, by the second officer (fol. 595); and he did not see the men of the other watch at all (fol. 601).

And he says that Vitolani belonged to the starboard watch, and remained at the bell (fol. 603), while Nelson says the starboard watch went to dinner first (fol. 681).

But Smith testifies that he was not on the forecastle, but at the bell, from the time they anchored till the watch was changed, at 2 o'clock, when Vitolani, who was in the other watch, took the bell, and he (Smith) went below and stayed till the collision (fols. 832, 834, 837).

Vitolani says he took the bell at 2 o'olock and was ringing it for between 15 and 25 minutes (fols. 886-8) when Santos relieved him about 5 or six minutes before the collision (fol. 889); and again he says he was ringing the bell for 20 or 25 minutes (fol. 902); while Santos says that Vitolani rang the bell "it might be five, might be seven, might be ten minutes" (fol. 907), and he himself continued to ring it about 10 or 12 minutes" (fol. 909).

As the collision happened at 10 minutes past two, as Nelson, the second officer, says (fol. 688), or as the pilot Shook says, at 2.14.30, it is manifest that neither could Vitolani have rung it as he says he did, nor could he and Santos have rung it as Santos says they did. And it is utterly contrary to the routine of ship's duty, that a man set at 2 o'clock to ring the bell should have been relieved by another five or even ten minutes after without any order from any one.

Nelson, the second officer, tells a different story. In fact, he tells several different stories. He first said that from the time he went on the upper bridge till the collision there was a man ringing the bell who was a stranger who had just come (fol. 643).

Then he says he knew all three of the men in the starboard watch who came on deck at 2, and he gives their names (fol. 681).

Then he says that he sung out to the man to "keep that bell going there" (fol. 692), but he did not know who the man was to whom he sung out because he was a stranger, and Smith was on the forecastle (fol. 693); while Smith says he himself "went to ring the bell just as quick as the anchor dropped" (fol. 832) and stayed there till 2 o'clock and then went below (fol. 837).

Then Nelson says that when the watch was changed at 2 o'clock, "first of all Pasquale Vitolani came out to the bell and he was there perhaps half a minute, and then Santos took his place" (fol. 697).

> It is to be noted that Vitolani and Santos were examined on March 6th, only six days after the collision, so that there was little lapse of time to affect their memories and to have caused such remarkable discrepancies.

(*d.*) Murphy says that he heard the bell ringing part of the time, and part of the time he did not hear it, and he adds that, "it may have been ringing" (fol. 1544). But he also says that, though he did not go forward, yet as far as he could see there was no one around there, and that he heard the chief officer shout in a loud voice to some of the men just about the time of the collision to keep that bell ringing (fols. 1548–9).

In considering the question as to the ringing of the bell, it is certainly a very curious circumstance that the second officer and the first officer also should have felt called upon to shout to the men forward to keep the bell going.

Now, when we put together with this fact the contradictions in the evidence, this alleged change of the man at the bell without reason between 2 and 2.10 P. M.; the impossibility of the evidence of the two men as to the time of their ringing the bell; the change of the officer on the upper bridge, and the

contradiction between those two officers as to the time of the change; the evidence of Russell and P. Murphy, as to their not hearing the bell, or seeing any one forward; and couple with these facts the fact that none of the *Bourgogne's* whistles were heard by either the officer claimed to have been on the bridge at that time, or the man claimed to have been at the bell (which is utterly inexplicable if proper vigilance was exerted), it seems easy to draw the conclusion that the fact that no bell was heard by any one of the 16 men on the *Bourgogne*, who were intent on hearing just such sounds, is to be accounted for by the conclusion that the bell was not rung for five or ten minutes before the *Bourgogne* came in sight, but that when her approach was seen, the man, who ought to have been ringing it before, began to ring.

In the case of *The Sam Weller* (5 Ben., 293), which was a question of lights, the Court said: "Clear evidence that a careful lookout, watching for lights, could not see a vessel approaching till upon him, and that then he saw her without lights, is certainly strong affirmative evidence that no light was then burning on the approaching vessel."

So in this case the evidence of sixteen witnesses, watching for bells, that they heard no bell from a vessel which they were approaching, till they were upon her, and that then they saw her without hearing a bell, is certainly strong affirmative evidence that no bell was being rung on the vessel for some minutes before she was seen.

On such a question mere numbers of witnesses must be sometimes considered. So in the case of *The Dale* (46 F. R., 670) where the libellant's witnesses were two to one in opposition, the Court accepted the story of the two.

See *The Circassia*, 55 F. R., 116.
Affirmed on Appeal, 73 F. R., 878.
La Champagne, 60 F. R., 303.

The evidence of the sixteen witnesses from the *Bourgogne* so far overpowers that of the witnesses from the

Ailsa, that the Court is called upon to believe either that the bell of the *Ailsa* was not rung during the four or five minutes before the *Ailsa* was seen, or that, if it was rung, there was something in the atmosphere or the position of the bell, which prevented its being heard. In either case, the *Bourgogne* is to be exonerated. If the Court shall on the evidence conclude that the bell was not rung at that special time, the *Ailsa* must be held in fault.

TWELFTH POINT.

The "Ailsa" was in fault in not slipping her chain.

The District Judge held the *Ailsa* in fault because her anchor chain was not allowed to run when the approach of the *Bourgogne* became visible (fol. 1853).

The *Ailsa's* counsel claims that it would have taken so much time to do this that it would have been of no use.

He apparently overlooked the evidence of the mate of the *Ailsa* that to do that would be "a couple of seconds' work" (Cote, fol. 584).

The case of *The Meanatchy* is no authority for the appellants on this point or any other. The *Meanatchy* was anchored in a proper place, and showed a proper light. The *Mary* undertook to cross ahead of her, between her and another vessel at anchor. The Court excused *The Meanatchy* from not having slackened her chain, because she could not tell, till a very late moment, whether the *Mary* would try to go ahead or astern of her.

But here, if the repeated whistles of the *Bourgogne* had been heard approaching, as they should have been with proper attention, there could have been no doubt, because she was approaching head and head. If any man had been on the forecastle there was abundance of time to have loosed the chain and let the *Ailsa*

drift, after the near approach of the *Bourgogne* from dead ahead was discovered.

THIRTEENTH POINT.

Erroneous statements in the Appellants' brief should be corrected.

It seems proper, even at the risk of lengthening this brief, to point out some erroneous statements in the briefs of the appellants:

(1.) The counsel for the *Ailsa* states twice (pp. 10 & 29) that the question of anchoring between Capt. Poirot and the pilot was raised abreast of Clifton and *above Quarantine*. But there is no question but that it was, as the District Judge remarked, about a quarter of a mile *below* Quarantine (see above p. 16).

(2.) Counsel says that there was no drift of the *Bourgogne* with the tide while straightening on her course from her pier, because, he says, "if there had been such a drift some of the many witnesses called would have noticed it and testified to it. The natural inference is that the witnesses did not testify to it, *because the fact did not exist.*" But, when it appears that no witness whatever was asked by counsel on either side in reference to it, the natural inference is that the witnesses did not testify to it *because they were not asked*. Counsel adds, "every one who has watched a steamer backing out from her pier knows that this is the usual course," *i. e.*, not to drift down with an ebb tide. The contrary is the fact. If it were to be claimed that the tide had no effect to carry the *Bourgogne* down stream, it was certainly incumbent on the appellants to give some evidence in support of such an extraordinary phenomenon.

(3.) The counsel says, "one reason why it was difficult to anchor when she reached the red buoy was the great speed of the *Bourgogne*." But there is not a

particle of evidence that there was any difficulty in anchoring near the red buoy. There was abundant reason for not anchoring there because her navigators could see two miles ahead at that time.

(4.) The brief says (p. 17) that "Fort Lafayette had become invisible, and this ought to have warned the *Bourgogne* not to attempt that narrow channel." But, although Fort Lafayette had become invisible, the red houses on the dock above it were not invisible, and the localities, therefore, were plainly to be seen. Moreover, the counsel's argument that the *Bourgogne* ought not "to attempt that narrow channel," is an unconscious admission that the *Ailsa* was anchored in the channel, as we claim she was.

(5.) Counsel states as a fact that the regulations with reference to the anchorage grounds "are made for ordinary cases, and point out where vessels may lie for weeks, if they choose, taking on or waiting for a cargo." This is a statement without a particle of proof and contrary to the wording of the rules themselves. The rules say "*any* vessel."

(6.) Counsel says that "it is a well settled rule that it is the duty of a vessel to anchor at once when unexpectedly beset with fog, even though in the channel." Not only is there no such well settled rule, but there is no case cited by the appellants which holds any such rule.

(7.) The counsel says (p. 22) that in the case of The *H. F. Dimock* the District Judge held that the *Alva* was not to blame for anchoring in a dense fog in Pollock Rip Slue. But in that case there was no regulation as to anchorage ground, and the District Judge found that the *Alva* was anchored "where vessels were accustomed to anchor, and out of the line of the usual course of vessels passing through the Slue in either direction."

(8.) The brief says (p. 23) that "there is positive, uncontradicted testimony from unimpeached witnesses

that they heard bells ahead of the *Ailsa* before she anchored." But the fact, proved without contradiction, that the only vessels which were at anchor within a mile south of the place where the *Ailsa* anchored were the *Bourgogne* and the *Werra*, both of which came down after the *Ailsa* anchored, is sufficient to contradict and impeach those witnesses.

(9.) The brief says that "there is a fallacy in the assumption that it is possible in a dense fog to tell just where the anchorage line is." All that was necessary in this case for the pilot of the *Ailsa* to determine where the anchorage line was, if he knew what it was, which he did not (fols. 320–1), was a compass and his own ears. If he had taken the *Ailsa* to where the bell on Fort Lafayette was north by west of him, instead of north or north by east, he would have known that he was east of the anchorage line. The pilot of the *Bourgogne* knew this and proposed to act accordingly (fol. 1219).

(10.) The brief says (page 27) that "The pilot of the *Ailsa* is of the opinion that the *Ailsa* was anchored on anchorage ground." But the pilot expressly refused to testify that he was of that opinion. All that he would say was that he was on the eastern side of the channel, and could not say whether he was on the inside of the line or on the line.

(11.) The counsel says that, although Capt. Morris and Cote think that the distance from the windlass to the water was from four to five fathoms, "actual measurement shows it to have been seven fathoms" (Brief, p. 28). What Capt. Morris said was that from the water to the windlass there would be "about three or four fathoms." And what Cote said was that it would be "four fathoms or thereabouts"—"eleven fathoms to the water and the fifteen-fathom shackle on deck."

The District Judge, in his opinion, referring to the testimony as to the measurement says: "I understand this testimony to refer to some measurement of

the plans of the ship. I am unable to verify it" (fol. 1848); while the *Ailsa's* counsel says that "the accuracy of the measurement can be tested by anybody with a rule and dividers, and when tested its accuracy is manifest." If the District Judge was unable to verify it by actual measurement of the plan, we do not think the counsel for the appellants are able to. We are not able to verify it ourselves. According to the best measurement that we have been able to make, the distance from the windlass to the water's edge was not more than twenty feet, which would agree with Capt. Morris' testimony. And it is very manifest that the evidence of the captain of the ship is a great deal more likely to be correct than the evidence of an outsider as to a measurement for which he gives no data, and which is based only upon a plan.

(12.) The brief says (p. 31) that "the shorter the distance between the place where the *Ailsa* sank and the place where she lay at anchor, the farther she must have been from the anchorage line." But this is an impossibility. She made easting continually till she sank. The farther the distance, the farther to the west she must have been.

(13.) The brief, to excuse the *Ailsa* for not having let her chain run, says she could not tell whether the *Bourgogne* was trying to pass under her stern. As the *Ailsa* was lying at anchor she was heading north by west. As the *Bourgogne* was coming she was coming in exactly the opposite direction, south by east. The idea of her going under the stern of the *Ailsa* would have been an utterly impossible one.

(14.) The counsel says (p. 44) that the whistles were heard by the pilot, but in the multiplicity of signals were not recognized as those of the *Bourgogne*.

The pilot says (p. 62)

> Q. Had you heard any whistles from the *Bourgogne* before you saw her? A. I heard a whistle to the north, but I could not distinctly say whether it was the *Bourgogne's* whistle, or what it was.

The *Bourgogne* was approaching the *Ailsa* head on, blowing her whistle, as she claims, once every 40 seconds; as the counsel for the appellants claim, blowing it too frequently. And yet all that the pilot of the *Ailsa* can say is that he heard a whistle but could not distinctly say whether it was a whistle from a vessel which was approaching. Manifestly in that situation, unless there was something in the atmosphere to prevent the whistle being heard, any man *paying attention to the requirements of the situation* would have heard a whistle directly ahead repeated several times until the vessel from which it came appeared in sight; and there could not have been any doubt as to the vessel which was blowing the whistle.

FOURTEENTH POINT.

So far as the Bourgogne is concerned the collision was due to inevitable accident.

See The *Morning Light*, 2 Wall., 550–561.
The *Schwan*, 7 Asp., 347.
The *Rebecca Shepard*, 32 F. R., 926.

The law of inevitable accident may be found laid down by the Supreme Court of the United States in the case of *The Morning Light*, 2 Wall., 550–561.

The definition of inevitable accident, as applied in that case to a collision at night (and the same rule would seem to apply to a case of fog) is this: "An occurrence which the party charged could not possibly prevent by the exercise of ordinary care, caution and maritime skill."

Under this rule the *Bourgogne* must surely be discharged from liability. As to her speed, she was certainly being navigated with more than ordinary care and caution. If she was to move at all she could not have moved more carefully. As to her lookout no one can claim that ordinary care and caution called for

the presence of more than sixteen men all attentive to the duty of looking and listening, or that the extraordinary measure of having a man at the crow's nest, was required any more than that of having a man at the masthead, for there is no evidence to show that either of these things was usual or would have afforded any advantage for a lookout; on the contrary the evidence is that it would not.

And that "ordinary care, caution and maritime skill"' would have called upon her to anchor when she could see nearly two miles ahead, or to anchor in the channel contrary to the Regulations when the fog shut down thick about her, is a proposition which has no reason to sustain it. On the contrary, her course is proved to have been conformable to "ordinary care, caution and maritime skill" by the fact that it was the course taken by six pilots, including the pilot of the *Ailsa*, under the same circumstances.

As far as the *Bourgogne* is concerned, therefore, the collision must be held to have been inevitable, and she is entitled to decrees affirming the decree of the Court below with costs.

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